UNITED OVERSEAS BANK (MALAYSIA) BHD A

v.

OCEAN AVENUE SDN BHD

HIGH COURT MALAYA, JOHOR BAHRU B
VERNON ONG LAM KIAT JC
[ORIGINATING SUMMONS NO: (MT-1) 24-2505-2006]
9 JUNE 2008

CONTRACT: *Option to purchase - Sale and purchase of property - Whether option granted under tenancy agreement - Whether option valid - Prescribed mode of acceptance - Whether complied with - Specific performance* C

CONTRACT: *Tenancy agreement - Construction of agreement - Option to purchase - Whether option granted under tenancy agreement - Whether option valid - Prescribed mode of acceptance - Whether complied with - Specific performance* D

LAND LAW: *Sale of land - Sale and purchase of property - Option to purchase - Whether option granted under tenancy agreement - Whether option valid - Prescribed mode of acceptance - Whether complied with - Specific performance* E

This application by the plaintiff was predicated upon an option to purchase certain premises ('demised premises') granted by the F defendant to the plaintiff under a tenancy agreement dated 30 April 2002 ('agreement'). The plaintiff sought, *inter alia*, an order declaring that the option had been validly exercised by the plaintiff, giving rise to a contract for sale of the demised premises by the defendant to the plaintiff. The pertinent issues requiring G determination were: (i) whether an option to purchase was granted to the plaintiff in the agreement; (ii) if so, whether the option to purchase was valid; (iii) if the option was valid, what was the prescribed mode of acceptance and whether the plaintiff complied with it. H

Held (for the plaintiff):

(1) Clause 8.9(a) in the agreement with the sub-heading "Option To Purchase" provided that the defendant grants the tenant an option to purchase the demised premises upon the expiry I of the third year of the agreement. It was also provided that

A the option granted shall be exercisable by the plaintiff in writing and may be exercised by the plaintiff until determination of the agreement. A mechanism for the determination of the value of the demised premises was also incorporated. Hence, it was clear that an option to purchase
B the demised premises was granted to the plaintiff upon the terms and conditions therein contained. (para 13)

(2) The words "option to purchase the demised premises" in the option must be given its natural meaning; otherwise, they
C would be deprived of all legal significance. It is a well-established principle that every doubtful grant ought to be construed in favour of the grantee. In this instance, the plaintiff, a licensed financial institution, was entitled to assume that it could exercise the option upon the terms contained
D therein. In the circumstances of this case, it was clear that both parties intended to make a contract for the sale and purchase of the demised premises; they thought they had done so. There was thus no difficulty in implying terms in the option in order to give effect to the legitimate expectation on the
E plaintiff's part. In the premises, the option was valid. (paras 32 & 33)

(3) The option may be exercised by the plaintiff at any time during and up to the date of the determination of the
F agreement. So, once the agreement was determined, the option was no longer exercisable. In these circumstances, it stood to reason that the option could only be exercised by the plaintiff during the subsistence of the first term of three years *ie*, not later than 30 September 2005, being the date of
G expiry of the term under the agreement. On the facts of this case, the option was in fact exercised by the plaintiff *vide* their letter dated 7 December 2004. (paras 35 & 37)

(4) In the present instance, this contract for the sale of the demised premises would be implied on the part of the
H defendant cum vendor as a covenant to do all things necessary to give effect to the agreement. In the premises, an order of specific performance was granted. (para 40)

[Order accordingly.]

I

Case(s) referred to:

Abdul Rahim Syed Mohd v. Ramakrishnan Kandasamy; Wan Ahmad Azlan Wan Majid & Anor (Interveners) [1996] 3 CLJ 393 HC ***(refd)***
Brown v. Gould and Others [1972] 1 Ch 53 ***(refd)***
Charles Grenier Sdn Bhd v. Lau Wing Hong [1997] 1 CLJ 625 FC ***(refd)***
Datuk Yap Pak Leong v. Sababumi (Sandakan) Sdn Bhd [1997] 1 CLJ 23 CA ***(refd)***
Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor [1995] 2 CLJ 713 CA ***(refd)***
Macon Works & Trading Sdn Bhd v. Phang Hon Chin & Anor [1975] 1 LNS 93 ***(refd)***
Montford & Anor v. Scott [1975] 1 Ch 258 ***(refd)***
Singma Sawmill Co Sdn Bhd v. Asian Holdings (Industralised Building) Sdn Bhd [1979] 1 LNS 96 ***(refd)***
Soo Lip Hong v. Tee Kim Huan [2005] 4 CLJ 119 CA ***(refd)***
Sou Yong v. Yuzin Abdullah [2006] 2 CLJ 1179 CA ***(refd)***
Subramanian Chettiar v. JC Chang [1969] 2 MLJ 176 ***(refd)***
Sudbrook Trading Estate Ltd v. Eggleton & Ors [1983] AC 444 ***(refd)***
Tai Joon Lan v. Yun Ai Chin & Anor [1993] 3 SLR 129 ***(refd)***
Teo Siew Peng v. Guok Sing Ong & Anor [1982] 1 LNS 99 ***(refd)***
Wisma Sime Darby Sdn Bhd v. Wilson Parking (Malaysia) Sdn Bhd [1996] 4 CLJ 194 CA ***(refd)***
Zainal Abidin v. Century Hotel Sdn Bhd [1986] 1 LNS 2 ***(refd)***

Legislation referred to:

Banking and Financial Institutions Act 1989, s. 66
Contracts Act 1950, ss. 2(d), 30
National Land Code, ss. 5, 433B

Other source(s) referred to:

Andrew Phang Boon Leong, *Cheshire, Fifoot and Furmston's Law of Contract (Second Singapore and Malaysian Edition),* p 151

For the plaintiff - GC Tan; M/s Shook Lin & Bok
For the defendant - PK Nathan; M/s PK Nathan & Co

Reported by Suresh Nathan

JUDGMENT

Vernon Ong Lam Kiat JC:

[1] The plaintiff's originating summons is predicated upon an option to purchase certain immovable properties granted by the defendant to the plaintiff under a tenancy agreement dated 30 April 2002. By the originating summons (the 'application') filed herein the plaintiff seeks the following orders:

A
1. an order declaring that the option to purchase two contiuous pieces of land together with two contiuous units of three storeyed shophouses erected thereon bearing postal addresses Nos. 26, 26-01, 26-02, 28, 28-01 and 28-02, Jalan Molek 1/13, Taman Molek, 81100 Johor Bharu contained in the
B tenancy agreement dated 30 April 2002 between the plaintiff and the defendant had been validly exercised by the plaintiff giving rise to a contract for sale of the properties by the defendant to the plaintiff;

C
2. an order that the sale contract for the sale and purchase of the properties between the plaintiff and the defendant be specifically performed and that the defendant do execute the sale and purchase agreement as per the draft annexed hereto within seven (7) days of the date of the order made herein;

D
3. (i) an order that, for the purpose of fixing the sale price for the properties, the defendant do accept the valuation of the properties at RM1,800,000 by Regroup Associates (Johor) Sdn Bhd;

E
(ii) in the alternative, an order that the defendant do accept such other valuation as may be made by an independent valuer nominated by this Honourable Court to ascertain the value of the properties, as defined in the agreement dated 30 April 2002 between the plaintiff and the defendant,
F as the sale price of the properties;

4. an order that the defendant, do within seven (7) days of the date of this order on the defendant, do all such acts and execute all such documents as may be necessary to conclude
G the sale of the properties to the plaintiff;

5. in the event of the defendant's default under paras (2) and (4) above, a further order that the senior assistant registrar of this court be empowered to execute the memorandum of transfer of the properties in the name and on behalf of the defendant
H in favour of the plaintiff for purpose of registration of the properties into the name of the plaintiff;

6. an order restraining the defendant from transferring, selling, disposing of, encumbering or otherwise dealing with the
I properties pending the transfer of the properties to the plaintiff;

7. an order for damages in addition to specific performance;

8. an order that the costs of this action to be taxed and paid forthwith by the defendant to the plaintiff.

Background Facts

[2] By a tenancy agreement dated 30 April 2002 ('the tenancy agreement') (exh. UOB1 in encl. 3) entered into between the defendant of the one part and the plaintiff of the other part, the defendant agreed to grant and the plaintiff agreed to accept a tenancy of the premises held under documents of titles nos. HS(D) 169448 PTD 85334 and HS(D)169447 PTD85333 Mukim of Plentong measuring 3074 square feet and 2544 square feet respectively together with two continuous units of three storey terraced shophouse erected thereon and bearing postal address Nos. 26 & 28, Jalan Molek 1/13, Taman Molek, 81100 Johor Bharu (the 'demised premises').

[3] The initial term of the tenancy is three years. The tenancy commences on 1 October 2002 and expires on 30 September 2005. The plaintiff has the option to renew the tenancy for a term of three years followed by a second option to renew for a further term of three years. The option to renew may be exercised by the plaintiff by the giving of two months prior written notice.

[4] Pursuant to cl. 8.9(a) ('the option') of the tenancy agreement the plaintiff was granted an option to purchase the demised premises upon the following terms:

> **8.9 Option To Purchase**
>
> a) The Landlord hereby grants the Tenant an option to purchase the said Demised Premises upon the expiry the third year of this Agreement. **Such option shall be exercisable in writing by the Tenant thereof until the determination of this Agreement.** However, value of the Demised Premises shall be determined by the valuation report of an independent valuer appointed by both parties. (emphasis added)

By a letter dated 7.12.2004 (exhibit UOB-2 in encl. 4) the plaintiff wrote to the defendant informing that it would like to exercise the Option. The said letter reads as follows:

December 7, 2004

Dear Sir,

Re: Premises at No. 26 & 28 Jalan Molek 1/13 Taman Molek 81100 Johor Bharu

We refer to the Tenancy Agreement of April 30, 2002 between yourself (as landlord) and us (as tenant).

Our bank would like to exercise the option per clause 8.9(a) of the Tenancy Agreement to purchase the Premises upon the expiry of the tenancy on 30th September 2005.

Per clause 8.9(a) of the Tenancy Agreement, Value of the Demised Premises shall be determined by the valuation report of an independent valuer appointed by both parties.

In view of this please revert to us the valuer of your choice per our list below:

- KGV & Associates (M) Sdn. Bhd.
- Stocker Roberts & Gupta
- Knight Frank (Ooi & Zaharui Sdn Bhd)
- Regroup Associates Sdn Bhd

If all the listed valuers are not agreeable to you please revert to us with your choice of valuer. Please revert within two weeks from the date of this letter.

Yours sincerely,

For United Overseas Bank (Malaysia) Bhd

Taman Molek Branch

...

Mr. Sneah Thean Keng
VP & Branch Manager

[5] It is the plaintiff's contention that the defendant through one Bong Then Fook agreed to the appointment of Regroup Associates Sdn Bhd ('Regroup') as the valuer. By a letter dated 6 June 2005 from Regroup to the plaintiff enclosing its report and valuation, Regroup stated the market value of the demised premises at RM1.8 million as at 24 May 2005 (exh. UOB8 in encl. 3).

[6] However, by a letter dated 19 May 2005 (exh. OA4 in encl. 5) to the plaintiff the defendant's solicitors forwarded a valuation report by KGV & Associates to the plaintiff. The demised premises was valued at RM2.5 million. In the said letter the defendant offered to sell the demised premises at RM3 million 'with rooms for negotiations'.

[7] By a letter dated 21 July 2005 (exh. OA1 in encl. 5) from the plaintiff's solicitors to the defendant's solicitors, the plaintiff reiterated that they had exercised the option. At the same time the plaintiff also exercised its option to renew the tenancy for a term of three years commencing on 1 October 2005. By a letter dated 3 August 2005 (exh. OA3 in encl. 5) the defendant agreed to the renewal of the tenancy aforesaid.

[8] By a letter dated 30 August 2005 (exh. OA6 in encl. 5) the defendant's solicitor gave an ultimatum to the plaintiff on its offer price of RM2.5 million.

[9] By a letter dated 23 November 2005 (exh. UOA5 in encl. 3) to the defendant the plaintiff's solicitors reiterated the plaintiff's position and requested the defendant to fulfil its obligation by agreeing to a new valuation of the demised premises. Subsequently by a letter dated 15 February 2006 (exh. UOA6 in encl. 3) to the defendant the plaintiff's solicitors forwarded a draft sale and purchase agreement. The plaintiff demanded that the defendant revert with its comments or approval of the said draft within seven days failing which the plaintiff will institute legal proceedings to compel the defendant to fulfil the same.

[10] By a letter dated 23 February 2006 (exh. OA5 in encl. 5) the defendant's solicitors disputed the plaintiff's claim and contended that the option to purchase contained in cl. 8.9(a) is inchoate.

Cause Papers

[11] The following affidavits were filed by the parties in relation to the application:

Plaintiff's affidavit (1) affirmed on 29 June 2006	Enclosure 3
Plaintiff's affidavit (2) affirmed on 27 July 2006	Enclosure 4
Defendant's affidavit (1) affirmed on 14 August 2006	Enclosure 5
Plaintiff's affidavit (3) affirmed on 14 September 2006	Enclosure 6
Defendant's affidavit (2) affirmed on 20 September 2006	Enclosure 7
Plaintiff's affidavit (4) affirmed on 6 October 2006	Enclosure 8

Facts In Issue

[12] After considering the written submissions of both parties and upon an examination of the affidavits filed in connection herewith, it is the court's finding that the pertinent facts in issue are as follows:

1. Whether an option to purchase was granted to the plaintiff in the Tenancy Agreement;
2. If so, whether the option to purchase is valid;
3. If the option is valid, what was the prescribed mode of acceptance;
4. Did the plaintiff comply with the prescribed mode of acceptance;

Whether An Option To Purchase Was Granted To The Plaintiff In The Tenancy Agreement

[13] Clause 8.9(a) in the tenancy agreement with the sub-heading "Option To Purchase" provides that the defendant "grants the tenant an option to purchase the demised premises upon the expiry the third year of this agreement" *(sic)*. It is also provided

that the option granted shall be exercisable by the plaintiff in writing. The option may be exercised by the plaintiff 'until the determination of this agreement." A mechanism for the determination of the value of the demised premises is also incorporated. In the premises it is the court's finding that an option to purchase the demised premises was granted to the plaintiff upon the terms and conditions therein contained. This question is accordingly answered in the affirmative.

Whether The Option To Purchase Is Valid

[14] The defendant contends that the option is void, invalid and unenforceable. This is a question of law. The defendant's contention is grounded on two planks, namely:

(i) There is no consideration paid to the defendant for the option; and

(ii) The option is vague and uncertain.

[15] On ground (i) above, learned counsel for the defendant argued that no consideration was paid to the defendant. He cited *Subramanian Chettiar v. JC Chang* [1969] 2 MLJ 176 which was also quoted by Prof Visu Sinnadurai in his book *The Sale and Purchase of Real Property in Malaysia*. Further reliance was made to the case of *Abdul Rahim bin Syed Mohd v. Ramakrishnan Kandasamy; Wan Ahmad Azlan bin Wan Majid & Anor (Interveners)* [1996] 3 CLJ 393 where at p 403 Visu Sinnadurai J said:

> In this regard, a principle of law which must also be borne in mind is that where the terms of an agreement are incomplete, the agreement is void for uncertainty.

[16] Learned counsel also referred to *Teo Siew Peng v. Guok Sing Ong & Anor* [1982] 1 LNS 99, *Tai Joon Lan v. Yun Ai Chin & Anor* [1993] 3 SLR 129, *Soo Lip Hong v. Tee Kim Huan* [2005] 4 CLJ 119 and *Sou Yong v. Yuzin Abdullah* [2006] 2 CLJ 1179 to illustrate instances where offers for sale were made after a sum of money was paid to the offeror. Learned counsel further referred to *Macon Works & Trading Sdn Bhd v. Phang Hon Chin & Anor* [1975] 1 LNS 93 where the option in question was held to be void for lack of consideration. In that case the option to purchase the property was granted in consideration of RM1. However, it was admitted by both parties that RM1 said to be acknowledged in the option was in fact never paid or received.

[17] In reply, learned counsel for the plaintiff submitted that the option was a term in the tenancy agreement between the plaintiff and the defendant. Further, the plaintiff had provided sufficient executed consideration when the plaintiff executed the tenancy agreement and/or by the plaintiff's performance of its obligations under the option including the procurement of the valuation of the demised property. In support thereof learned counsel quoted the example of executed consideration cited in *Cheshire, Fifoot and Furmston's Law of Contract* (Second Singapore and Malaysian Edition) by Andrew Phang Boon Leong (now judge of the Singapore Court of Appeal) at p. 151:

> Of executed consideration the best example is the offer of a reward for an act. If A offers £5 to anyone who shall return his lost dog, the return of the dog by B is at once the acceptance of the offer and the performance of the act constituting the required consideration.

[18] Learned counsel for the plaintiff also submitted that the defendant had promised to keep the option open until the determination of the tenancy agreement. As the tenancy agreement was renewed on 21 July 2005 for a further three year term the plaintiff had thereby provided consideration by its performance of its obligations under the option. As for the cases cited by the defendant abovementioned, learned counsel for the plaintiff submitted that in none of these cases was it held that the consideration to be provided must be in the form of monetary payment only. (see s. 2(d) Contracts Act 1950). In this context, Sir Frederick Pollock's definition of consideration which was accepted by the House of Lords in *Dunlop Pneumatic Tyre Co. Ltd v. Selfridge & Co. Ltd* and cited with approval in *Macon Works & Trading (supra)* is as follows:

> An act of forbearance of the one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable.

[19] In *Montford & Anor v. Scott* [1975] 1 Ch 258 considering the proposition that an option to purchase land creates an equitable interest in the land Brightman J *inter alia* held that:

> It would seem immaterial to this concept that the option happened to be gratuitous. It is only necessary ... that the option should have been validly created.

> It is not the function of equity to protect only those equitable interests which have been created for valuable consideration.
>
> If it were not open to the holder of an option gratuitously created to obtain an order for specific performance, it would seem impossible to assert that an option creates, as it does, an equitable interest in the land.

[20] In this case the option does not stipulate that consideration had to be provided by the plaintiff in the form of monetary payment. Thus, it was submitted that the cases cited by the defendant can be distinguished on the facts.

[21] In regard to ground (ii) above learned counsel for the defendant argued that the option is void for uncertainty because (a) the purchase price of the demised premises cannot be ascertained and (b) the defendant did not set any terms and conditions for the sale and purchase of the demised premises. Learned counsel for the defendant argued that the appointment of a common valuer was never agreed upon by the parties. The basis of the valuation of the demised premises is also an issue of contention. The defendant insists that the valuation of the demised premises must take into account all existing fixtures and fittings. (relying on s. 5 of the National Land Code). In the premises it is the defendant's contention that the purchase price for the demised premises cannot be ascertained. In support of this contention learned counsel for the defendant cited *Singma Sawmill Co. Sdn Bhd v. Asian Holdings (Industralised Building) Sdn Bhd* [1979] 1 LNS 96, *Wisma Sime Darby Sdn Bhd v. Wilson Parking (Malaysia) Sdn Bh*d [1996] 4 CLJ 194 and *Zainal Abidin v. Century Hotel Sdn Bhd* [1986] 1 LNS 2. Secondly, learned counsel for the defendant argued that as the option is silent on the terms and conditions of the sale it follows that nothing was agreed upon. In support thereof learned counsel relied on two cases – *Sudbrook Trading Estate Ltd v. Eggleton & Ors* [1983] AC 444 and *Tai Joon Lan (supra)*.

[22] In reply learned counsel for the plaintiff submitted that the purchase price of the demised premises is capable of being made certain by an independent valuation carried by an a valuer appointed by both parties. In illustration (e) to s. 30 Contracts Act 1950 it is provided as follows:

A (e) A agrees to sell to B "one thousand gantangs of rice at a price to be fixed by C". As the price is capable of being made certain, there is no uncertainty here to make the agreement void.

[23] Learned counsel for the plaintiff further submitted that if the valuation by Regroup is unacceptable, then adopting the approach B in *Sudbrook Trading Estate Ltd (supra)* an inquiry into the fair value of the demised property based on the definition contained in the tenancy agreement can be ordered. *Zainal Abidin (supra)* and *Wisma Sime Darby (supra)* both cited by the defendant have been rejected by the Court of Appeal in *Luggage Distributors (M) Sdn* C *Bhd v. Tan Hor Teng & Anor* [1995] 2 CLJ 713. Further, *Wisma Sime Darby* and *Zainal Abidin (supra)* are also distinguishable on their facts and not applicable. In *Wisma Sime Darby* there was no machinery or formula for the court to ascertain the rent in the event that the parties could come to an agreement. In *Zainal* D *Abidin* the lessee did not give the landlord any notice in writing of his intention to extend the lease.

[24] Learned counsel for the plaintiff further submitted that the plaintiff's reliance on s. 5 of the National Land Code is E misconceived. Section 5 refers to things attached to the earth or permanently fastened to anything attached to the earth. The renovations done on the demised premises includes fittings which are not attached to the earth or permanently fastened but may be removed. Similarly, in *Singma (supra)* the fixtures in question were F heavy machineries which were attached to the floor by screws and bolts.

[25] The defendant's further argument is that the option is vague and uncertain because the defendant did not set any terms and G conditions for the sale and purchase of the demised premises. In reply the plaintiff submitted that firstly, the following statutory provisions are implied into the sale contract, namely (i) Section 66 of the Banking and Financial Institutions Act 1989, (ii) Section 433B of the National Land Code and (iii) the Foreign Investment H Committee Guideline on the Acquisition of Properties by Local and Foreign Interests. Learned counsel for the plaintiff submitted that in such situations terms may be implied into the contract by court. It was submitted that in the light of the relationship between the plaintiff and the defendant, the court should lean in I favour of upholding the bargain struck between the parties. (see *Datuk Yap Pak Leong v. Sababumi (Sandakan) Sdn Bhd* [1997] 1 CLJ 23).

[26] In the particular circumstances of this case it is clear that on the affidavit evidence the defendant is in fact prepared to sell the demised premises to the plaintiff. The only real issue of contention is the price. The defendant wants to sell at the higher price of RM2.5 million instead of RM1.8million. As the parties were unable to compromise on the price of the demised premises, the defendant now contends that the option is invalid because (i) the purchase price cannot be ascertained and (ii) the terms and conditions of the sale and purchase agreement has not been set down.

[27] In the first instance, a contract for the sale and purchase of immovable property as in this case is quite a common occurrence. In fact, such transactions take place practically on a daily basis. The fact of the plaintiff requiring the approvals of Bank Negara and the Foreign Investment Committee is really not in issue. Indeed, implied in a contract for the sale of immovable property is a covenant on the part of the vendor to do all things necessary to give effect to the agreement – this includes obtaining the requisite approvals of the relevant authorities. In *Charles Grenier Sdn Bhd v. Lau Wing Hong* [1997] 1 CLJ 625 the Federal Court held at p. 633 that:

> The law leans in favour of upholding bargains and not in striking them down willy-nilly. And its declared policy finds expression in the speech of Lord Wright In *Hillas & Co v. Arcos Ltd* [1932] All ER Rep 494 where he said:
>
> Businessmen often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is, accordingly, the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defects; but on the contrary, the court should seek to apply the old maxim of English law, *verba ita sunt intelligenda ut res magis valeat quam pereat.* That maxim, however, does not mean that the court is to make a contract for the parties, or to go outside the words they have used, except in so far as there are appropriate implications of law, as, for instance, the implication of what is just and reasonable to be ascertained by the court as matter of machinery where the contractual intention is clear but the contract is silent on some detail.

A This principle applies not only to documents drafted by layman, but also to those prepared by lawyers (see *Australian Broadcasting Commission v. Australasian Performing Right Association Ltd* [1973] 129 CLR 99).

B We have examined the two letters that passed between the parties. We are unable to find that the parties intended that there should be no concluded contract until a formal sale and purchase agreement had been executed by them. On the contrary, we find their objective intention to be travelling in quite the opposite direction.

C They have identified the parties to the transaction with sufficient clarity. So too the property, the price and the terms they considered essential. Such an agreement is termed an 'open contract'. It is enforceable as if it was embodied in a document with all the attendant solemnity. In order to give it effect, the law D will – acting out of necessity (see *Liverpool City Council v. Irwin* [1977] AC 239) – imply terms into the contract for sale in order to make it work. See *Rojasara Dahyabhai v. Jano Narottamdas Lallubhai* [1986] 3 SCC 300, where it was held that *there was to be implied in a contract of sale of land, a covenant on the part of the vendor to do all things necessary to give effect to the agreement.* E (emphasis added)

[28] Further, the question of whether the option is void for uncertainty falls to be answered with settled principles. In *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor* [1995] 2 CLJ F 713 the registered owner of a piece of property (the appellant) rented out the ground floor ('the premises') to the respondents. In the tenancy agreement, the option to renew was only mentioned in the recital. The appellant later entered into an agreement to sell the property. Upon learning of the intended sale G the respondent exercised the option to renew the tenancy and then proceeded to enter a caveat against the register document of title to the property. The primary issue that arose for determination was whether the respondents had a caveatable interest. Since the respondent were exempt tenants the Court of H Appeal held they had no caveatable interest in the land and the only protection available to them under the National Land Code was an endorsement of the exempted tenancy upon the register document of title. In addressing the issue of whether the option is void for uncertainty Gopal Sri Ram JCA speaking for the Court I of Appeal said at p. 733:

The next question that requires to be addressed is whether the option is void for uncertainty. In order to deal with this question it is important to recall the form in which the right is expressed in the second recital. The material words are 'plus a further two years option'. There is no mention of the manner or the time within which the option is to be exercised or of the covenants which are to operate during the second term. Can it then be said that the option is void for uncertainty? In my judgment, that question falls to be answered in accordance with settled principles.

Continuing at p. 735:

Lewis v. Stephenson [1898] 67 LJ QB 296 was also cited and relied upon by the respondent's counsel in support of his submission that the option was not void for uncertainty. The headnote of that report reads as follows:

> Premises let by agreement in writing, not under seal, for a term of three years commencing from a certain date, at a clear yearly rental of £80 and £8 yearly for the use of water, payable on the usual quarter days, 'with the option of renewal'. Held, that the words 'with the option of renewal' were sufficiently definite to enable the court, at the instance of the tenant, to carry them out by a decree for specific performance for a renewed agreement for the same period, on the same terms, except as to renewal, as those contained in the agreement.

The judgment of Bruce J is of such importance that I shall quote from it *in extenso*. This is what he said:

> The question to be decided, then, is whether the defendant can claim against the plaintiff specific performance of the alleged agreement to renew.
>
> Upon this question two points were raised by the plaintiff's counsel – first, whether the plaintiff, as purchaser of the lease, is to be fixed with notice of the contents of the lease to the defendant; and secondly, whether the words in the lease relating to renewal are sufficiently definite to enable the court to carry out by a decree of specific performance. On the first point I entertain no doubt. It was expressly decided by Lord Loughborough in *Taylor v. Stibbert* [1794] 2 Ves 437. The Lord Chancellor in that case said: 'It has been determined, that a purchaser being told, particular parts of the estate were in possession of a tenant, without any information as to his interest, and taking it for granted it was only from year to year, was bound by a lease, that

tenant had, which was a surprise upon him.' In that case the very question was raised whether the purchaser was affected with notice of a covenant for renewal contained in a lease which he had not seen, and it was held that he was. That decision is followed by Lord Eldon in the case of *Daniels v. Davison* [1809] 16 Ves 249. At p 254 of the report, the Lord Chancellor said: 'My opinion therefore, considering this as depending upon notice, is, that this tenant, being in possession under a lease, with an agreement in his pocket to become the purchaser, those circumstances altogether give him an equity, repelling the claim of a subsequent purchaser, who made no enquiry as to the nature of his possession.' These cases have been followed by a long line of cases, and the principle of them was approved by the Judicial Committee of the Privy Council in *Barnhart v. Greenshields* [1853] 9 Moo PCC 18X. The second point is a much more difficult one. What meaning is to be given to the words 'with an option of renewal'? It was contended on behalf of the plaintiff that the words did not define either the length of the period for which the renewed lease was to be granted, or the terms of the renewed lease, or the person by whom or the period within which it was to be exercised. Let me consider these points in order. What does the word 'renewed' signify? According to Dr Johnson, one meaning of the word is 'to repeat; to put again in act'. In accordance with this meaning of the word is the dictum of Lord Abinger in *Price v. Asheton* [1834] 4 LJ Ex Eq 3, where that learned judge, speaking of a renewed lease, says: 'That is a renewal of the old lease; and therefore, in point of duration, coinciding with the former lease.' And it is to be gathered from the same judgment that the Chief Baron considered that a renewed lease meant not only a lease coinciding with the former lease in duration, but, further, a lease containing the same terms. This *dictum* of Lord Abinger that a renewed lease means a lease of the same duration as the original lease is cited apparently with approval in Fry on Specific Performance, and in other books of authority. But this pronouncement of Lord Abinger can. I think, only be treated as a *dictum*. There was in point of fact in that case no agreement to grant a renewed lease, and in the correspondence which was relied upon as affording evidence of the alleged agreement the word 'renewal' did not occur in any letter of the defendant. It only occurred once in a letter of the plaintiff, and the defendant in his answer to that letter did not adopt the word renewal, but spoke only of his intention of granting 'a lease'. Lord Abinger's

judgment was given on an application for an interlocutory injunction. When the case came on for hearing before Mr Baron Alderson, that learned judge held that there was no agreement to grant a renewed lease, in fact no definite agreement at all. If there was no agreement, he though it was an agreement in which time and rent were left to future regulation, and he dismissed the bill for an injunction with costs. It seems to me that the judgment of Mr Baron Alderson, while it does not support the *dictum* of Lord Abinger, does not in any way conflict with it – see *Hyde v. Skinner* [1723] 2 P Wms 196 and *Furnival v. Crew* [1744] 2 Atk 83. I feel the greatest difficulty in differing from even a dictum of Lord Abinger, and it seems to me it is only to give to language its natural meaning to hold that a renewal of a lease means the renewing of the old lease for the same period and on the same terms. Unless such a meaning is given to the word 'renewal', the words in the present agreement are deprived of all legal significance, and I am reluctant to come to the conclusion that the words inserted in a legal document ought to be taken as having no legal effect. But then it is said that if the terms of the renewed lease are to be the same as the terms of the original lease, the renewed lease must contain a stipulation for renewal, and so on in perpetuity. But such a construction is, I think, manifestly unreasonable. "With option of renewal' does not mean with continued options of renewal after renewal. There is, I think, sufficient authority to support the view that an express provision that all covenants in the original lease shall be inserted in the renewed lease will not include a covenant for further renewal – see *Iggulden v. May* [1804] 9 Ves 325 and *Hyde v. Skinner*. The court leans against a construction for perpetual renewal unless there be express words to show that it is clearly intended – *Baynham v. Guys Hospital* [1796] 3 Ves 294. The next point to be considered is whether the words define the persons by whom the option is to be exercised. It is a well-established principle that every doubtful grant is to be construed in favour of the grantee, and I cannot entertain a doubt that upon the proper construction of the words the option is vested in the lessee – see *Doe d Webb v. Dixon* [1807] 9 East 15. As to the period within which the option is to be exercised when nothing is specified, I think I am doing no violence to the ordinary canon of construction when I say I think that must be taken to mean within a reasonable time before the expiration of the original lease; and as in the

A present case the defendant applied for a renewal in the month of March, and the original tenancy did not expire until 24 June, I think the application for renewal was in time ...

B Applying the interpretative guidelines adverted to and applied by Bruce J to the second recital in the tenancy agreement, it is my considered view that the option was not void for uncertainty. Indeed, it was valid and available for exercise in January 1994.

C Further, I think that, in the circumstances of this case, it would not be a strain upon the powers of this court to imply the requisite term in the tenancy agreement on the basis of necessity (see *Liverpool City Council v. Irwin* [1977] AV 239; [1976 2 All ER 39; [1976] 2 WLR 562; *Tai Hing Cotton Mill v. Liu Chong Hin Bank* [1986] AC 80; [1985] 2 All ER 947) or for the purpose of lending it business efficacy (see *The Netherlands* D *Insurance Co Est 1845 Ltd v. Karl Ljungberg & Co* [1986] 2 MLJ 321).

Continuing further down at p. 737:

E Reverting to the present appeal, the respondents were businessmen looking for some security of tenure in order, no doubt, to establish a goodwill in their trade. I think, they were, on a reading of the second recital, entitled to assume that they would be entitled to elect, before the end of the first term, whether they wanted another two-year term upon the same mutual covenants, F save and except for the right to a future renewal. Speaking for myself, I find no difficulty in implying a term in the tenancy agreement which give effect to this legitimate expectation of the part of the respondents.

G In commercial transactions nothing is more meaningful than a business sense approach to questions of interpretation. As Brightman LJ (as he then was) observed in *Law Land Co Ltd v. Consumers' Association Ltd* [1980] 255 EG 617:

H Some modification has to be made to the strict wording of the rent review clause if it is to work. I fully recognise the attractiveness of the arguments advanced by [counsel], but they lead to a solution which, to my mind, is not practical and cannot possibly have been contemplated by the parties. The lease is a commercial document and we have to find a commercial solution to the problem posed.

I

In a similar vein, Lord Diplock in *Antaios Compania Naviera SA v. Salen Rederierna AB* [1985] AC 191 at p 201; [1984] 3 All ER 229 at p 233; [1984] 3 WLR 592 at p 598 said:

> While deprecating the extension of the use of the expression 'purposive construction' from the interpretation of statutes to the interpretation of private contracts, I agree with the passage I have cited from the arbitrators' award and I take this opportunity of restating that, if a detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.

[29] The defendant's refusal or non-cooperation to the appointment of an independent valuer when requested to do so by the plaintiff *vide* the plaintiff's letter dated 17 December 2004 presents another issue. In their refusing to the appointment of an independent valuer, the defendant is contending that the option is void for uncertainty since the price cannot be determined. Certainly, this is an issue of the defendant's own making. The option was obviously intended to have legal effect, that is to say, to create legally enforceable rights and obligations. What other reason could there be for going to the trouble of inserting this particular 'cl. 8.9(a) – Option To Purchase' in the tenancy agreement. This amounts to a breach on the part of the defendant to fulfil its obligation under the option to do all things necessary to give effect to the agreement. In fact the defendant's refusal to give effect to the option in the manner that it did offends against the common law rule of self-induced frustration.

[30] In *Sudbrook Trading Estate Ltd v. Eggleton & Ors* [1983] AC 444 the appellants were the tenants under four leases. Each of the appellants were granted an option to purchase the reversion in fee simple in the premises at a price of not less than £12,000 as may be agreed upon by two valuers. Of the two valuers one was to be nominated by the lessor and the other to be nominated by the lessee and in default of such agreement by an umpire appointed by the valuers. The lessees exercised their options to purchase the reversions but the lessor refused to appoint a valuer. The lessees sought declarations, *inter alia*, that upon a true construction of the leases the option clauses conferred upon them valid options to purchase the reversions in fee simple at a valuation and that those options had been validly exercised and for an order for specific performance. The lessor on the other

A hand claims that there is no contract for the sale of the reversion because the price has not been fixed. Allowing the appeal the House of Lords held that on its true construction, the agreement was for sale at a fair and reasonable price by the application of objective standards. Therefore once the options were exercised in
B accordance with the necessary preconditions, since the price was capable of being ascertained and was therefore certain, a complete contract for the sale and purchase of the freehold reversion was constituted. The House of Lords also held that the contracts so constituted should be specifically performed and an inquiry as to
C the fair valuation be held and the conveyances made to the lessees, if necessary, by the court. At p 479 Lord Diplock said:

> In the first place the contract upon its true construction is in my view a contract for sale at a fair and reasonable price assessed
D by applying objective standards. In the second place the only thing that has prevented the machinery provided by the option clause for ascertaining the fair and reasonable from operating is the lessor's own breach of contract in refusing to appoint their valuer. So if synallagmatic contract created by the exercise of the option were allowed to be treated by the lessors as frustrated the
E frustration would be self-induced, a circumstance which English law does not allow a party to a contract to rely to his own advantage. So I see no reason why, because they have broken one contractual obligation the lessors should not be ordered by the court to perform another contractual obligation on their part
F namely to convey the fee simple in the premises to the lessees against payment of a fair and reasonable price assessed by applying the objective standards to which I have referred.

And further down the page:

G
> ... but when honest parties to a contract for the sale of land or an option to enter into such a contract have in the past inserted provisions for the ascertainment of the purchase price similar to the italised words included in the option clause in the instant case they must have intended to create legal rights to have those provisions acted on by both parties and not flouted by either party
H at his own sweet will; otherwise there is no point in inserting them at all.

I

And at p 486 Lord Fraser has this to say:

> I do not believe that honest persons are in the habit of making agreements containing option clauses in terms such as those now under consideration, on the basis and with the intention that the option will be unenforceable. On the contrary, I think they would generally be astonished to be told that the exercise of the option had not brought about a complete contract.
>
> The appropriate means for the court to enforce the present agreement is in my opinion by ordering an inquiry into the fair value of the reversion.

[31] In this context it is also pertinent to note what the Court of Appeal said in *Datuk Yap Pak Leong v. Sababumi (Sandakan) Sdn Bhd* [1997] 1 CLJ 23 at p. 51:

> Second, where businessmen make an agreement between themselves – whether aided or unaided by legal advisers and there are ambiguities in their contract – the court will as far as possible, lean in favour of upholding their bargain. Support for this proposition – and for the very narrow function which is reserved to the court in the matter of implying terms in a contract – is to be found in the decision of the House of Lords in *Hillas & Co. Ltd v. Arcos Ltd.* [1932] All ER Rep 494. Lord Wright, in an oft-quoted passage in his speech, laid down the judicial philosophy that underlies the court's function in this area of law. Referring to the particular agreement in that case, he said:
>
> > The document of 21 May 1930 cannot be regarded as other than inartistic, and may appear repellant to the trained sense of an equity draftsman. But it is clear that the parties both intended to make a contract and thought they had done so. Businessmen often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is, accordingly, the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defects; but on the contrary, the court should seek to apply the old maxim of English law, *verba ita sunt intelligenda ut res magis valeat quam pereat.* That maxim, however, does not mean that the court is to make a contract for the parties, or to go outside the words they have used, except in so far as there are appropriate implications of law, as, for instance, the implication of what is just and reasonable to be ascertained by the court as matter of machinery where

> the contractual intention is clear but the contract is silent on some detail. Thus in contracts for future performance over a period, the parties may not be able nor may they desire to specify many matters of detail, but leave them to be adjusted in the working out of the contract. Save for the legal implication I have mentioned, such contracts might well be incomplete or uncertain; with that implication in reserve they are neither incomplete or uncertain. As obvious illustrations I may refer to such matters as prices or times or discharging in a contract of sea carriage. Furthermore, even if the construction of the words used may be difficult, that is not a reason for holding them too ambiguous or uncertain to be enforced if the fair meaning of the parties can be extracted.

And at p. 53:

> The third proposition which we accept as settled is that a court's power to imply a term in a contract forms part of its interpretative jurisdiction. This comes across in the following passage in the judgment of Mason J (as he then was) in *Codelfa Construction Pty Ltd v. State Rail Authority of New South Wales* [1982] 149 CLR 337 at p 345:
>
> > In this ocean of litigious controversy, there is one large island of agreement between the parties. It is common ground that their contract consists of the agreement dated 21 March 1972 and the various documents which it incorporates. The appellant does not suggest that dehors the agreement and the incorporated documents there is to be found a term actually agreed upon by the parties which together with the contract documents stands as the true contract or which stands in its own right as a collateral contract. Nor does the appellant suggest that there is a case for rectification arising from the existence of such a term on the footing that it was inadvertently omitted from the contract documents. The appellant's case is that a term has to be implied in a contract to give it business efficacy, to make it workable. Consequently, there is no contest as to what constitutes the contract; rather the contest is as to its meaning and effect.
> >
> > When we say that the implication of a term raises an issue as to the meaning of the effect of the contract, we do not intend by that statement to convey that the court is embarking upon an orthodox exercise in the interpretation of the language of a contract, that is, assigning a meaning

> to a particular provision. Nonetheless, the implication of a term is an exercise in interpretation, though not an orthodox instance.

Fourth, an examination of the authorities shows that the law differentiates between two categories of cases – we will call them 'category I' 'category II' – when determining whether a term ought to be implied in a contract, subject always to the qualification that there is absent a contrary intention. Such a contrary intention may, of course, take the form of an express stipulation in the contract. For it is a well-established principle of law that a term will not be implied if to do so would contradict some express provision in the contract or set naught the main aim or object of the contract.

The following observation by the editors of *Chitty on Contracts* (25th Edn) in para 842 of that work bears out the existence of Category I:

> The implication of a term is a matter of law for the court, and whether or not a term is implied is usually said to depend upon the intention of the parties as collected from the words of the agreement and the surrounding circumstances. In many classes of contract, however, implied terms have become standardised, and it is somewhat artificial to attribute such terms to the unexpressed intention of the parties. The court is, in fact, laying down a general rule that in all contracts of a certain type, for example – sale of goods, landlord and tenant, the carriage of goods by land or sea – certain terms will be implied, unless the implication of such a term would be contrary to the express words of the agreement. Such implication do not depend on the intention of the parties, actual or presumed, but on more general considerations.
>
> It is also important to realise that such general implications may have a profound effect upon the relationship which one class of persons bears to another, eg employers and employees. The real question then becomes, not what terms can be implied in a contract between two individuals who are assumed to be making a bargain in regard to a particular transaction, but the determination of a matter akin to a question of status.

Category I therefore comprises those relationships in which the court more readily implies a term in the contract unless there is evinced a contrary intention. The court acts in such cases with greater readiness to imply a term in order to make the particular relationship workable.

A Contracts between a banker and his customer (*Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank Ltd & Ors* [1986] 1 AC 80); between an employer and his employee (*Scally v. Southern Health and Social Services Board & Anor* [1992] 1 AC 294); between a principal and his agent (*Pasuma Pharmacal Corp v. McAlister & Co Ltd* [1965] 1 MLJ 221); **between a vendor and purchaser of immovable property** (*Rojasara Ramjibhai Dahyabhai v. Jani Narottamdas Lallubhai* [1986] 3 SCC 300 at p 308) and between a landlord and his tenant *(Liverpool City Council v. Irwin & Anor* [1977] AC 239) fall within this category. In the case of contract between a vendor and purchaser of goods, the implication of terms is expressly authorised by statute, namely the Sale of Goods Act 1957.

The test that is to be applied when implying a term in the relationships within category I is necessity. (emphasis added)

[32] Adopting this approach to the particular circumstances of this case it is the duty of this court to construe the option (cl. 8.9(a)) fairly and broadly without being too astute or subtle in finding defects. This principle applies not only to documents drafted by layman but also to legal documents prepared by lawyers. In order to give effect the law will acting out of necessity or for the purpose of lending it business efficacy, imply terms into the contract of sale to make it work. And in this case will be implied a covenant on the part of the defendant/vendor to do all things necessary to give effect to the agreement. The words 'option to purchase the demised premises' in the option must be given its natural meaning. Unless such a meaning is given to these words, they will be deprived of all legal significance. This court is reluctant to come to the conclusion that the said words inserted in a legal document such as the tenancy agreement ought to be taken as having no legal effect. It is a well established principle that every doubtful grant ought to be construed in favour of the grantee.

[33] The plaintiff a licensed financial institution is entitled to assume that it is entitled to exercise the option upon the terms therein contained. This is an appropriate case for the court to imply a term in the option in order to give effect to the legitimate expectation on the part of the plaintiff. In the circumstances of this case it is clear that the parties both intended to make a contract for the sale and purchase of the demised premises; they thought they had done so. In this case the court finds no difficulty in implying terms in the option in order to give effect to the

legitimate expectation on the part of the plaintiff. In many classes of contracts implied terms have been standardised. A contract for the sale of immovable property is one such class. Such implications do not depend on the intention of the parties, actual or presumed, but on more general considerations. In the premises this court finds that the option is a valid option.

What Is The Prescribed Mode Of Acceptance?

[34] Learned counsel for the defendant argued that the option may only be exercised after the expiry of the third year of the tenancy and not before ie, at anytime after 1 October 2005. In this regard, it is pertinent to examine cl. 8.9(a) in the tenancy agreement. It provides that the option shall be exercised in writing by the plaintiff until the determination of the tenancy agreement. The operative word in cl. 8.9(a) is 'until' as it determines the point in time when the option is to be exercised. 'Until' is defined in the *Cambridge Advanced Learner's Dictionary* (2nd edn) as 'up to (the time that)'. Applying that definition to the option clause, cl. 8.9 would read like this:

> Such option shall be exercisable in writing by the Tenant **up to (the time that)** the determination of this Agreement. (emphasis added)

[35] Read in this light, it means that the option may be exercised by the plaintiff at any time during and up to the date of the determination of the tenancy agreement. So, once the tenancy agreement is determined, the option is no longer exercisable. It stands to reason that in this circumstance the option may only to be exercised by the plaintiff during the subsistence of the first term of three years, ie, not later than 30 September 2005 being the date of the expiry of the term under the tenancy agreement.

[36] Learned counsel also argued that the option may only be exercised by the plaintiff. Accordingly, he contended that the plaintiff's solicitor's letter dated 7 December 2004 purporting to exercise the option is of no effect. The question of whether the option may be exercised by the plaintiff's solicitors on the plaintiff's behalf may be answered by reference to the definition of the word 'tenant' contained in cl. 1.1 in the tenancy agreement which reads as follows:

A Means the Tenant named and described in Section 2 of the Schedule Two and includes its successors in title and permitted assigns or (in the case of a natural person) its legal representatives and permitted assigns **and includes where the context so admits the Tenant's employees and agents**. (emphasis added)

B **[37]** The word 'tenant' has been clearly defined in the tenancy agreement to include the plaintiff's agents. In the premises it is clear that under the terms of the tenancy agreement the option may be exercised by the plaintiff or its employees or agents. In the premises the defendant's contention that the option may only C be exercised by the plaintiff is without merit. The defendant's contention that the option was purportedly exercised by the plaintiff's solicitors, hence their said contention, is unfounded and misplaced. In the particular circumstances of this case the defendant's contention is also immaterial as the option was in fact D exercised by the plaintiff *vide* their letter dated 7 December 2004.

Did The Plaintiff Comply With The Prescribed Mode Of Acceptance?

E **[38]** By a letter dated 7 December 2004 the plaintiff informed the defendant that our 'bank would like to exercise the option per cl. 8.9(a) of the tenancy agreement to purchase the premises upon the expiry of the tenancy on 30 September 2005.' Learned counsel for the defendant submitted that the plaintiff's purported F exercise of the option was premature as it was made before the expiry of the third year of the tenancy period. Having made the finding in the preceding paragraphs that the option may be exercised at any time during the subsistence of the first term of three years, ie, on or by 30 September 2005, it would follow that G the said exercise of the option by the plaintiff was a valid exercise of the option so as to constitute a contract for the sale and purchase of the demised premises.

[39] Learned counsel for the defendant also submitted that by a H letter dated 23 November 2005 the plaintiff's solicitors purported to exercise the option on the plaintiff's behalf. He argued that that purported exercise was an exercise in futility as the plaintiff cannot be allowed to exercise the option twice. Further learned counsel for the defendant argued that the option does not allow any agent I of the plaintiff to exercise the option on their behalf. For the reasons adverted to earlier, the defendant's contention is misconceived. The plaintiff has already validly exercised the option

vide their letter dated 7 December 2004. The subsequent letters of the plaintiff's solicitors merely reiterated the plaintiff's position. Accordingly, as the option had already been exercised by the plaintiff, the defendant's contention is immaterial and devoid of merit.

[40] In conclusion, the incontrovertible facts show that pursuant to cl. 8.9(a) in the tenancy agreement the defendant granted to the plaintiff an option to purchase the demised premises. The option granted is a valid option which upon the exercise thereof constitute a contract for the sale of the demised premises. The plaintiff exercised the option in accordance with the prescribed mode of acceptance *vide* its letter dated 7 December .2004. To quote Megarry J in *Brown v. Gould and Others* [1972] 1 Ch 53 at p 58: 'Under an option, only one step is normally needed to constitute a contract, namely, the exercise of the option.' In this instance, this contract for the sale of immovable property will be implied on the part of the defendant cum vendor a covenant to do all things necessary to give effect to the agreement. In the premises the court granted an order of specific performance. In view of the defendant's reluctance and or non-cooperation to the appointment of an independent valuer, it is also ordered that for the ascertainment of the purchase price of the demised premises an independent valuer be appointed by the court to ascertain the value of the demised premises as defined in the tenancy agreement.